In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1273

MILDRED POPKIN,

Petitioner

versus

NEW YORK STATE HEALTH and MENTAL HYGIENE FACILITIES IMPROVEMENT CORPORATION

Respondent

PETITIONER'S RESPONSE TO BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioner, Mildred Popkin, made application to this Court for a Writ of Certiorari on March 14, 1977, to review a judgment of the United States Court of Appeals for the Second Circuit. On May 2, 1977, the Clerk of this Court requested a response to the petition from the Attorney General of the State of New York. That response was filed on or about June 1, 1977. Because respondent contends that the issue presented in the petition for certiorari, the retroactivity of the 1972 Amendments to Title VII of the Civil Rights Act of 1964, was not properly raised below, petitioner feels further discussion of her position is necessary.

ARGUMENT

The Issue of the Retroactivity of the 1972 Amendments to Title VII Was Raised by Petitioner In the District Court and Was Fully Discussed By Both That Court and the Court of Appeals. The Issue Is Properly Before this Court.

The district court's decision dismissing petitioner's complaint accurately characterized petitioner's stance in that Court. "Plaintiff, conceding that 'political subdivisions' were exempt at that time (under Title VII prior to March, 1972), argues that defendant is not a 'political subdivision', or, if it is, that the 1972 amendments to Title VII eliminating this exemption should be applied retroactively." *Popkin v. New York State Health and Mental Hygiene Facilities Improvement Corp.*, 409 F. Supp. 430, 431, (S.D. N.Y. 1976). (Appendix B to Petition for Certiorari at A-9). The district court went on to address that argument, holding specifically that, "[p]laintiff's contention that the 1972 amendments to Title VII, eliminating the 'political subdivision' exception, should be applied retroactively is incorrect". *Popkin, supra*, 409 F. Supp at 432 (Appendix B to Petition for Certiorari at A-11). On appeal, petitioner's brief did not discuss the retroactivity issue, but defendant's brief did. (See Brief for Defendant-Appellee, *Popkin v. New York State Health and Mental Hygiene Facilities Improvement Corp.*, No. 76-7167, Second Circuit, at 11-12). The Second Circuit dealt directly with the retroactivity issue, cited previous decisions of that Circuit on the question and concluded that, "[t]he district court's refusal to give the 1972 amendments to Title VII retroactive effect was correct". 547 F. 2d 18, 21 (2d Cir. 1976) (Appendix A to Petition for Certiorari at A-7).

Respondent's position apparently is that the retroactivity question is not properly before the Court because; (1) the issue was not discussed in petitioner's brief in the Second Circuit, and (2) petitioner did not couch her argument in the same terms used in the district court.* These arguments will be treated separately.

In the Courts below petitioner raised the retroactivity issue but relied primarily on the argument that defendant was not a political subdivision and was thus always covered by Title VII. That, of course, in no way precludes petitioner from relying on the retroactivity issue here. In *Giordenello v. United States*, 357 U.S. 480, 484 ftnt. 2 (1958), the Court stated:

> It appears that in the courts below petitioner relied primarily, if not entirely, on the first of these grounds. That of course does not prevent him from relying here also on the second ground, which raises simply a question of law as to the sufficiency of the complaint.
>
> (citations omitted)

This Court has held that question passed on by the Court of Appeals will be considered on certiorari even though not raised in the trial court. *Friend v. Talcott*, 228 U.S. 27, 36 (1913); *Sabbath v. United States*, 391 U.S. 585, 588 (1968). Here the issue was raised in the trial court and was also addressed by the Court of Appeals. *Sabbath* is particularly relevant. There, the government argued that petitioner

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* Respondent's brief stresses that, "[n]owhere did petitioner raise the claim that since her administrative proceeding was pending at the time the Amendment was passed, the Amendment is retroactive as to her." Brief for Respondent in Opposition at 4.

had not adequately raised at trial an illegal entry issue relied on in this Court. The Court commented:

> [T]he Government met the issue on the merits in the Court of Appeals, and apparently did not there contend the record was inadequate for its resolution, and the Court of Appeals decided the issue on the merits. In these circumstances we are justified in likewise doing so.
>
> 391 U.S. at 588, ftnt. 1.

That is exactly the case here. The state's brief in the Second Circuit discussed retroactivity and argues for affirmance of the district court's decision on that ground. The Court of Appeals certainly felt the issue was properly before it and reached the merits. This Court should do likewise.

Respondent also places significance on the fact that petitioner did not specifically argue to the Courts below that her administrative claim with the EEOC was pending when the 1972 amendments became effective. Whatever the significance of that fact may be, the Courts were well aware that Ms. Popkin's EEOC charges were pending when the 1972 amendments became effective in March, 1972. The Second Circuit stated that petitioner was discharged in January, 1971, 547 F.2d at 19 (Appendix A to Petition for Certiorari at A-2) and that an EEOC determination in her favor had been made in March, 1973, 547 F.2d at 20, ftnt. 3 (Appendix A to Petition for Certiorari at A-6). The Second Circuit's decision was arrived at with full knowledge of the relevant facts. Respondnet has not cited any authority for

the contention that this Court can only consider a legal argument framed in exactly the same terms as in the Courts below. Indeed there is no such authority.

CONCLUSION

Petitioner prays that her petition for certiorari be granted and, for the reasons stated in the original petition, the judgment below should be vacated and remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Response to Brief for Respondent in Opposition was mailed to Louis J. Lefkowitz, Attorney General of New York, 2 World Trade Center, New York, New York, 10047 and Joan P. Scannell, Deputy Assistant Attorney General, 2 World Trade Center, New York, New York, 10047, this 10th day of June, 1977.

GEORGE M. STRICKLER, JR.